FAMILY LAW

Cases and Materials

Volume I

Brenda Cossman and Carol Rogerson
Faculty of Law
University of Toronto

2010 - 2011

* * *

These materials are distributed solely for classroom use by students in the Faculty of Law, University of Toronto

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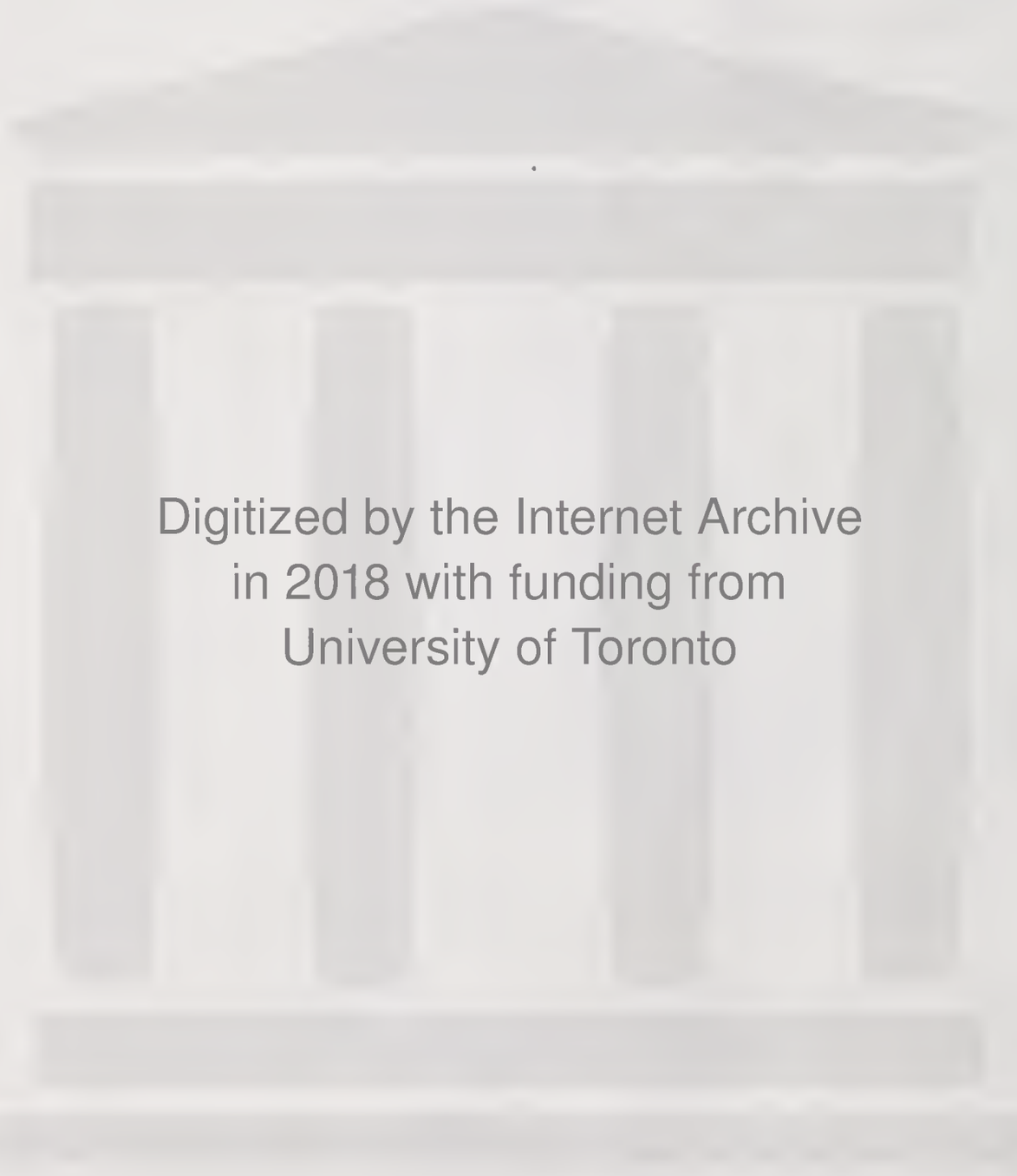


for the first time was about five years lower than in 2003. This gradual rise in the average age at first marriage is largely due to couples cohabiting and delaying marriage.

Large gap in the average age at first marriage among the provinces

Among the provinces, excluding Ontario, the average age of the bride and of the groom at first marriage (opposite-sex couples) was highest in Quebec and lowest in Saskatchewan.

The average age of grooms in Quebec (31.9 years) was 2.6 years higher than that observed in Saskatchewan (29.3 years). The average age of brides in Quebec (30.4 years) was 3.4 years higher than that of brides in Saskatchewan (27.0 years).

Three-quarters (75.2%) of marriages in Canada were performed in a religious ceremony. The vast majority (98.3%) of marriages in Ontario were performed by a member of the clergy, the highest proportion in Canada. The lowest proportions were in British Columbia (41.0%) and the Yukon (26.6%).

NOTE: More recent marriage statistics, showing a modest increase in the number of marriages, are found in the table below compiled by Statistics Canada:

Marriages by province and territory

	2004	2005	2006	2007[p]	2008[p]
	number of marriages				
Canada	**148,585**	**148,439**	**149,792**	**151,695**	**150,423**
Newfoundland and Labrador	2,850	2,806	2,752	2,698	2,797
Prince Edward Island	827	829	828	831	824
Nova Scotia	4,729	4,698	4,667	4,633	4,687
New Brunswick	3,708	3,686	3,646	3,622	3,669
Quebec	21,279	22,244	21,900	22,650	22,400
Ontario	64,114	64,677	65,170	65,483	64,959
Manitoba	5,710	5,732	5,746	5,796	5,767
Saskatchewan	5,011	5,000	4,995	5,080	5,080
Alberta	17,909	18,392	19,060	19,837	19,100
British Columbia	22,080	20,007	20,660	20,697	20,770
Yukon	160	159	160	158	161
Northwest Territories	141	140	138	139	138
Nunavut	67	69	70	71	71

[p] : preliminary.
Source: Statistics Canada, CANSIM, table (for fee) 053-0001.
Last modified: 2009-06-23.

[found online at http://www40.statcan.gc.ca/l01/cst01/famil04-eng.htm]

but a glimpse of a fleeting moment. For some of the very factors that give our present social organization a *quasi*-feudal look, are also elements of instability within it.

For example, I have noted our increasing dependence on wage labor and certain changes in the bonding of the employment relationship which call be characterized as involving an increase in job security. But this security, a mere creation of law, could be wiped out by a severe economic crisis. A second troublesome factor than prevents any simple generalization is that for many individuals (women and racial and ethnic minorities in particular) *access* to the preferred forms of new property (good jobs and work-related benefits) is limited. For some, this means their relationship to government and government benefits, a less desirable form of new property, assumes paramount importance. For others, it means they depend on family relationships which seem to be becoming increasingly fragile. Finally, although heightened dependency on work and lowered dependency on family relationships have had certain effects on the law some of which I have sketched, we can only speculate as to what long range *social* effects there will be from a situation where individuals are increasingly dependent on work, yet where work dissatisfaction seems widespread. What are we to make of the curious apparent exchange of values through which legal norms governing the workplace are increasingly particularistic and personalized, looking toward the continuation of the relationship with adjustments on both sides; while legal norms pertaining to the family are increasingly universalistic and neutral, facilitating 'discharge' and 'replacement' when 'performance' does not come up to standards or expectations?

I am far from having reached a conclusion in my own thinking and research on the matters discussed here....

B. Unmarried Cohabitation

Note: Terminology

There is frequently some confusion regarding the use of the terms "common law marriage" and "common law relationship". The terms are often used interchangeably and many people speak of a common law relationship as though it were the same as a legal marriage. In fact, a common law marriage, or a marriage valid by common law, differs from a common law relationship both in its formation and in the rights and obligations which attach to it.

In Ontario, a common law *relationship* arises by force of law on a statute-by-statute basis, and is typically based on a period of cohabitation. For example, for the purpose of support rights under the Ontario *Family Law Act,* parties are deemed to be in a common law relationship when they have cohabited continuously for at least three years or if they are parents to a child and have cohabited in a relationship of "some permanence". However, many statutes, both federal and provincial, conferring public benefits adopt a definition of common law relationship which requires that the parties have cohabited continuously for one year or are parents to a child in a relationship of some permanence. Parties to a common law relationship (often referred to as common law spouses or common law partners) do not automatically have the same rights and responsibilities as married couples; in certain circumstances the law has simply decided to treat them in the same way as married couples. A common law spouse may withdraw, unmarried, from the relationship at any time. Because there has been no marriage, no divorce is required to dissolve the relationship.

In contrast, a common law *marriage* results from a ceremony which lacks the legal formalities of compliance with statutory requirements and in which the parties verbally agree to take each other as husband and wife. The common law recognizes such marriages in circumstances where compliance with the statutory formalities is impossible, such as, for example, situations of war. In contrast to a common law relationship, a common law marriage is treated as a legal marriage for all purposes, and thus, a common law marriage may be dissolved

only by way of divorce. In *Keddie v. Currie* (1991), 60 B.C.L.R. (2d) l, the British Columbia Court of Appeal considered the law concerning common law marriages in some detail. The Court held that common law marriages could not, in general, be entered into in British Columbia because the British Columbia *Marriage Act* specifically provided for the formal requirements of marriage and the circumstances would be rare where a couple wishing to marry was unable to comply with the statutory requirements.

Statistics Canada, *Family Portrait: Continuity and Change in Canadian Families and Households in 2006*

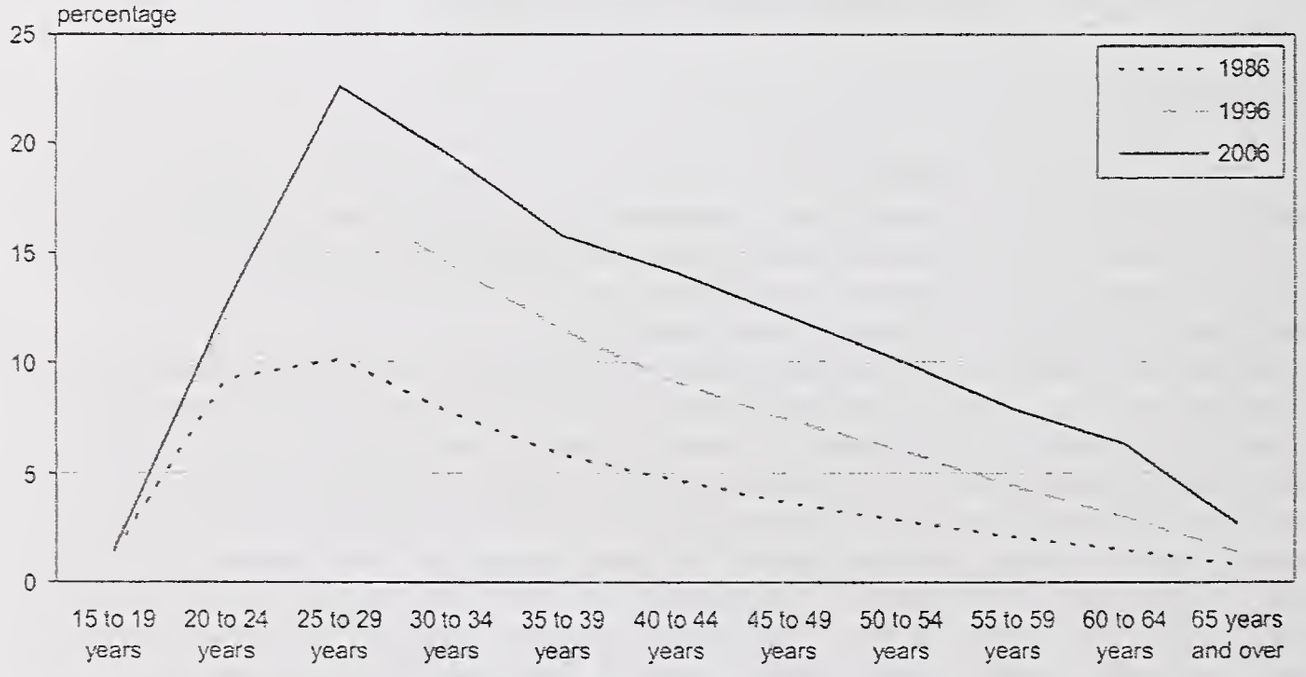
(Ottawa: Statistics Canada, September, 2007,Catalogue no. 97-553-XIE) at 20-22, 24 – 25, 35-36

Living as part of a common-law couple growing rapidly, especially for older age groups

Common-law unions have increased in popularity over the past 25 years in Canada. The census enumerated 2.8 million persons aged 15 and over who lived in a common-law union in 2006.They represented 10.8% of the population, up from 9.7% in 2001.

Common-law unions were most prevalent among young adults and they were most popular among individuals aged 25 to 29. About 22.6% of people in this age group were in a common-law union in 2006, up from 20.6% five years earlier.

Figure 8 Persons in common-law couples increasing for all age groups



Sources: Statistics Canada, censuses of population, 1986, 1996 and 2006.

The increase in common-law relationships suggests greater social acceptance of this family structure, as well as a desire to be part of a couple, but perhaps with fewer perceived emotional or financial obligations than those generally associated with marriage.

Although common-law unions were more predominant among the young, in recent years older age groups have experienced the most rapid growth. Gains have been especially fast during the past five years among people in their forties and over. The number of individuals aged 60 to 64 in common-law unions rose 77.1% between 2001 and 2006, the fastest pace of all age groups.

In deciding this matter, I place great weight on the fact that the parties discussed the possibility of marriage some day. In my view, this gives the relationship a touch of permanence. The Legislature has used the words "some permanence" and I cannot find that there was no permanence to the relationship between Miss Labbe and Mr. McCullough.

The length of time the applicant and respondent cohabited was very brief. This, however, goes to the quantum of support that the respondent must provide, and not to his liability to do so....

In my opinion, notwithstanding the tender age of the child, Katrina, in view of the brief and sporadic nature of the parties' cohabitation, the respondent should not be required to support the applicant for a lengthy period.

Accordingly, after assessing the needs of the applicant, and the respondent's ability to meet those needs, I have decided to order the respondent to provide support for the dependant spouse in the amount of $150 per month in advance for a period of 12 months commencing on April 1, 1979.

[Custody was awarded to the mother and child support of $75 per week was ordered.]

NOTE: *Macmillan-Dekker v. Dekker* (2000), 10 R.F.L. (5th) 352 (Ont. S.C.J.)

In this case Macmillan appealed from a decision that concluded she and Dekker were not common-law spouses for the purpose of determining her entitlement to support under the *Family Law Act* (Ont.). From 1988 to 1989, the parties clearly cohabited in a conjugal relationship. Initially, the couple had planned to marry. However, Macmillan decided that she did not want marriage. They planned to have a child, but failed. After a surgery that purported to facilitate having a child, Macmillan became bedridden for 10 months. Thereafter, the parties continued to reside together until 1996, but Dekker alleged that their post-surgery relationship had been one of brother and sister or close friends. Macmillan maintained that their relationship in the next seven years remained conjugal.

The parties moved together on three occasions. In 1994, Dekker referred to Macmillan as his wife on a lease. The parties had separate bedrooms after 1989. Throughout the relationship, the parties engaged in occasional sexual relations. In a telephone message after their separation, Dekker acknowledged a ten-year relationship with Macmillan. He told her that he loved her and that he did not think that he could ever let her go. During the time of co-habitation, each party had been involved in a short relationship with another person. Macmillan looked after Dekker's finances. The parties had joint accounts and their monies were intertwined. They shared household duties. They socialized together as husband and wife. At trial Macmillan attempted to introduce a series of cards and letters written to her by Dekker that spoke to a relationship deeper than friendship. Only one card was admitted at trial

Macmillan's appeal was allowed. The court's ruling can be summarized as follows: All the cards and letters should have been admitted to determine the intention of the parties in regard to the nature of their post- 1989 relationship. The post-surgery relationship, which was perpetuated by Macmillan's dependency on Dekker, was more consistent with an unhappy marriage in difficulty, rather than with a friendship or a sibling relationship. The various aspects of the relationship, when viewed objectively, were supportive of a finding of a conjugal relationship. The trial judge had erred by placing undue emphasis on the subjective intention of the parties in regard to the nature of their relationship.

The interim support order of $500 per month was reinstated pending the final determination of the matter.

NOTE: *Campbell v. Szoke* (2003), 45 R.F.L. (5th) 261 (Ont. S.C.J.) [Digest of case taken from *The Lawyers Weekly*, Oct. 24, 2003, 23 TLWD 2324-003]

The parties had a 17 and a half-year relationship. They were sexually intimate and socialized together. Friends and acquaintances saw them as a couple. They lived in Florida for six months of the year. For the remaining six months of the year, they lived in Ontario in separate residences, defendant with his son, plaintiff in her own apartment where defendant was a frequent visitor. Defendant proposed marriage in Feb./ 82. However, his son did not approve and defendant subsequently avoided the issue of marriage. The parties entered into two written agreements. The first was a cohabitation agreement dated Oct. 5/89, which provided, inter alia, that "[each of the parties] shall have no financial or moral obligations to the other [...] Neither [party] currently, or in the future, shall rely on the other for any assistance (financial or otherwise) or support. Neither [party] shall make any demands on the other, either financially or morally." Plaintiff refused to sign it until almost a year later. The second agreement purported to be an employment contract dated Nov. 1/92, which defendant typed himself. Plaintiff had no legal advice in either case. The relationship ended in Sept./98, when plaintiff underwent treatment for breast cancer. She subsequently applied for support, declaration of constructive or resulting trust and unjust enrichment, and restitution.

HELD: order for support in the amount of $1,100 per month retroactive to Dec. 1/98. Defendant is not a credible witness. The documentary evidence does not support his position that he is without assets and that plaintiff was his employee. He clearly treated plaintiff as a spouse, not an employee. He bought her an engagement and wedding ring. The court finds that he has deliberately tried to retrospectively change the nature of the relationship and organize his affairs to leave him with no obvious assets. The court considers the requirements for support under Part III of the Family Law Act (Ontario). The fact that parties maintain separate residences does not prevent a finding of cohabitation. The court finds that the parties lived together as common-law spouses within the meaning of s. 29 of the Act. It also finds that plaintiff did not have financial disclosure or legal advice and signed the cohabitation agreement under duress. The document must be set aside. Pursuant to s. 30 of the Act, defendant has an obligation to provide support for plaintiff to the extent he is capable of doing so. Although the court has no specific evidence of what defendant's means are or were, it is satisfied that he continues to have the means he had throughout the relationship, and continues to have the ability to support plaintiff. The court bases the quantum of support on the amount of support that defendant provided to plaintiff and money paid to her throughout the years, as well as an amount to reflect support of her Florida lifestyle. It finds $1,100 an appropriate monthly amount, made retroactive to Dec. 1/98. Turning to plaintiff's remaining claims for constructive or resulting trust and unjust enrichment, the court notes that plaintiff is receiving about $6,000 a year from social services, and, in the court's view, it is inappropriate for her to be given an equitable remedy based upon a relationship that she was at pains to conceal in order to receive a financial benefit from public funds. Plaintiff does not have "clean hands" to request equitable relief. [The Ontario Court of Appeal upheld this decision in brief reasons at (2005), 12 R.F.L. (6th) 263.]

"Ontario's Divisional Court to rule on whether mistress might win spousal support"
Cristin Schmitz, *The Lawyers Weekly*, November 1, 2002

When does a mistress become a common law spouse? Can clandestine affairs that produce offspring be considered quasi-marriages? Do illicit lovers ever qualify for spousal support?

Those questions are raised by an unusual case a three-judge panel of Ontario's Divisional Court will hear next March.

In late September, Ontario Superior Court Justice Peter Howden granted leave to appeal to Divisional Court to Margo Sturgess, a 58-year-old Barrie, Ont. nurse who wants to sue William James Shaw, a 60-year-old jeweler from Orillia, Ont., for $3,000 a month spousal support under Ontario's Family Law Act.

does not appear that either the people in their communities or the parties themselves considered themselves as spouses or as a couple who were living together."

Holding that while the pair "spent considerable time together," they did not live together, he said consenting adults with separate residences who visit one another cannot be considered to "cohabit."

He ruled Sturgess failed to make a "good arguable" case that she met the extended definition of spouse.

NOTE: *Stephen v. Stawecki* (2006), 32 R.F.L. (6th) 282 (Ont. C.A.) [summary taken from Epstein and Masden's Family Law Newsletter, July 25, 2006, available online on Westlaw Canada]

This case arose out of a fatal motor vehicle accident in which one of the parties to a common law relationship was killed. The surviving partner sought damages for wrongful death of a spouse under the Ontario *Family Law Act*. To qualify as a spouse under s. 61(1) of the Act, she had to establish that the parties had been "cohabiting" for three years prior to the accident date, i.e. as of May 6, 2000. Although the parties were residing together at the time of the accident, they had not moved in together at the beginning of the three year period. The trial judge found that the parties were cohabiting as of the relevant date and the decision was upheld by the Ontario Court of Appeal.

The trial judge referred to *Molodowich v. Penttinen*, and reiterated that the seven descriptive components (shelter, sexual and personal behaviour, services, social, societal, support and children) are the helpful formula to guide the Court's inquiry.

There was much evidence in this case that the parties were cohabiting even though they maintained separate residences. In the time leading up to May 2000, the parties spent most nights together, travelled together, did not date other people, had a sexual relationship, celebrated Christmas together and contemplated selling their homes to get a home together.

The defence maintained that the parties were not cohabiting because they maintained separate vehicles and residences, and because there was no evidence relating to the manner in which expenses were shared. As the trial judge noted:

> The necessary intent to cohabit in a conjugal relationship was formed by the parties before May 6, 2000, although perhaps it was not documented until later. Their relationship was an exclusive one, neither party being unfaithful. They slept, shopped, gardened, cooked, cleaned, socialized, and lived together as a couple and were treated as such by their friends, family and neighbours. While they may not have finalized any joint financial arrangements and continued to maintain separate residences, they lived together under the same roof.

Accordingly the trial Court found that they were spouses and the plaintiff was entitled to maintain her claim.

In a short endorsement, the Court of Appeal accepted the trial judgment and dismissed the appeal. The appellant suggested that the Court of Appeal should impose a bright-line test and conclude that since the respondent had not moved in with the deceased, they were not living together at the time. The Court of Appeal unanimously disagreed and noted that the phrase "moving in" would add no precision to the meaning of "live together," and would not provide a clear and definitive test. The Court of Appeal firmly noted that a bright-line test is not possible and there must be a flexible approach taken by the Court to determine whether spouses are cohabiting. The fact that one party continues to maintain a separate residence does not preclude a finding that the parties are living together in a conjugal relationship.

In the case of *M. v. H.,* which follows, the Supreme Court of Canada extended the functional approach it had adopted to unmarried cohabitation in *Miron* to same-sex relationships and to the context of private obligations between the parties to the relationship, specifically spousal support obligations. *M. v. H.* is an important chapter in the story of legal recognition of same-sex relationships in Canada, a story which will be continued in the materials on marriage, found below. But the decision is also significant for its impact on legal treatment of unmarried couples in Canada.

M. v. H.

[1999] 2 S.C.R. 3 ; 46 R.F.L. (4th) 32

[Two women, known as M. and H., lived together in a same-sex relationship for 10 years from 1982-1992. H. was in a financially stronger position than M. during the relationship. The parties lived in a house owned by H., and started their own business. H.'s contributions to the business were greater than those of M., who devoted more time to domestic tasks. When the business failed due to the dramatic downturn of the economy, H. was able to find other employment, but M. was not. When their relationship broke down in 1992, M. commenced an action against H., advancing a number of claims including a claim to spousal support pursuant to Part III of the *Family Law Act R.S.O.* 1990, c. F.3. Section 29 of the Act extended the definition of "spouse" beyond married persons to also include a man and a woman who are not married and had cohabited continuously for a period of not less than three years.

M. challenged the constitutionality of the definition of spouse, arguing that the exclusion of same-sex couples violated s. 15 of the *Charter.* The motion was heard by Epstein J. who held that s. 29 of the *FLA* did violate section 15, and was not saved by section 1. She extended the definition of spouse in s. 29 by severing the words " a man and a woman" and reading in the words "two persons". The Ontario Court of Appeal upheld the decision, but suspended the implementation of the declaration of invalidity for one year, to give the Ontario legislature time to amend the *FLA*.]

CORY AND IACOBUCCI JJ. (Lamer C.J., L'Heureux-Dubé, McLachlin, and Binnie JJ. concurring):--

I. Introduction and Overview

[1] The principal issue raised in this appeal is whether the definition of "spouse" in s. 29 of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*") infringes s. 15(1) of the *Canadian Charter of Rights and Freedoms*, and, if so, whether the legislation is nevertheless saved by s. 1 of the *Charter*... [Cory J. addresses the issue of breach of s.15(1) of the Charter and Iacobucci J. addresses the issues of s. 1 and remedy.]

CORY J.: [. . .]

[7] At the outset, it must be stressed that the questions to be answered are narrow and precise in their scope. The *FLA* provides a means whereby designated persons may apply to the court for support from a spouse or, if unmarried, from a man or woman with whom they lived in an opposite-sex conjugal relationship. The Act specifically extends the obligation for support beyond married persons who, as a result of their married status, have additional rights under the Act.

[8] The question to be resolved is whether the extension of the right to seek support to members of unmarried opposite-sex couples infringes s. 15(1) of the *Charter* by failing to provide the same rights to members of same-sex couples.

[Bastarache J. wrote a separate decision concurring with the majority conclusion that s. 29 was unconstitutional, but for different reasons than those given by Cory and Iacobucci JJ.]

Appeal dismissed; remedy modified.

NOTE: Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act (1993).*

In his judgment in *M. v. H.* Gonthier J. refers to the 1993 Report of the Ontario Law Reform Commission on The *Rights and Responsibilities of Cohabitants Under the Family Law Act (1993).* The report recommended the extension of matrimonial property rights provided for in Parts I and II of the Ontario *Family Law Act* to unmarried opposite sex couples. However the report recommend against the extension of these rights and rights of spousal support to same-sex unmarried couples, preferring instead a scheme of registered domestic partnership. The Commission reasoned as follows:

> The rationale for many of the provisions of the *Family Law Act* appears to apply to same-sex couples, at least to the extent that their relationships share characteristics common to heterosexual couples. In the interest of fairness, therefore, same-sex couples should receive some legislative recognition. Anti-assimilationist commentators present a powerful countervailing viewpoint, however, that we must take into account when considering options for reforming the law. Historical and continuing discrimination against gay men and lesbians has hampered attempts to learn about the structure of same-sex relationships, and it may well have hampered the formation of such households. Our lack of knowledge about the form that such relationships take and the expectations of the parties involved prompts us to adopt a cautious approach to reform. At the same time, the existing law in which same-sex couples are completely excluded from the *Family Law Act,* appears to violate the principle of equality expressed in the *Human Rights Code* and enshrined in our constitution. In our view, this fact alone makes reform imperative.
>
> Several approaches to including same-sex couples within the scope of the *Family Law Act* are possible. They are not mutually exclusive.[The options of contract and registered domestic partnership are then discussed. The Commission recommended that legislation be enacted to establish a system permitting the registration of domestic partnerships. Such schemes will be dealt with below in the section of the materials dealing with same-sex marriage.]
>
> **(c) Ascribed Spousal Status**
>
> The *Family Law Act* could be amended to provide that unregistered same-sex couples are treated in the same fashion as unmarried (or unregistered) heterosexual couples. In chapter 2 of this report, we recommended that unmarried heterosexual couples, as defined in the Act, should be treated in the same fashion as married persons. Including unregistered same-sex cohabitants in the Act as well would satisfy the demands of formal equality, but it is unclear whether it would meet the standard of substantive equality expressed in human rights and constitutional jurisprudence. The property and support provisions of the *Family Law Act* are designed to ensure that a couple who live in a relationship of economic interdependence, characterized by trust and the pursuit of mutual goals, share equally in the economic benefits of the relationship. The statute reflects the assumption that spouses act in their joint economic interest, rather than in pursuit of independent goals. The rights to equalization of property and possession of the family home, and the mutual obligation of support, are intended to ensure that neither partner suffers unfair economic consequences from the breakdown of a relationship. The same rationale applies to all intimate relationships in which the parties form an economic partnership. We believe that the imposition of this scheme on married couples and unmarried heterosexual cohabitants whose relationships bear many of the characteristics of marriage is appropriate. This scheme might also be appropriate for same-sex couples who have intimate relationships that are also primary economic partnerships. However, we do not have adequate evidence before us about the nature of relationships between same sex cohabitants and the expectations of members of those relationships to justify imposing these rights and obligations upon them.
>
> We realize that excluding unregistered same-sex couples from the scope of the *Family Law Act* may leave some individuals, who have made uncompensated contributions to their partner's wealth, without an accessible and predictable means of redress in the event that the relationship breaks down.

Such parties would be left to those common law remedies briefly described elsewhere in this report. On the other hand, the ascription of spousal status to all such couples may also lead to unfairness, if, as seems possibly to be the case, a significant number do not organize their affairs as economic partnerships. The provisions of the *Family Law Act* are designed, in significant measure, to give effect to the sorts of reasonable expectations and to compensate for the kinds of uncompensated contributions that are liable to occur in marital relationships and in unmarried heterosexual relationships that follow a similar pattern. The types of reasonable expectations and uncompensated contributions that arise in such relationships appear to rest on gender-based assumptions concerning such matters as the division of labour within the family setting and the making of career choices and other economic decisions. It is against this background that we have recommended elsewhere in this report that spousal status be ascribed to unmarried heterosexual couples in certain circumstances. To be sure, there may be many such couples who have made a conscious decision to avoid the obligations assumed to accompany marriage. Having made this decision, however, such couples would, under our recommendations, be free to enter a binding agreement to contract out of these obligations. For the couple that has not made such a decision, however, the general patterns to which we refer raise, in our view, a significant risk that parties who are in need of the kinds of protection afforded by the Act will not receive them. This risk is compounded by the fact that, under existing law, such couples are brought within the Act to a limited degree, thus creating for some, at least, the misleading impression that all of the Act's protections for married couples are available to them.

We have not been able to conclude the same considerations apply or apply to the same degree to same-sex couples. It may be that some, perhaps many, same-sex relationships follow a similar pattern to that which, as we have suggested above, is liable to occur with married and unmarried heterosexual couples. As we have indicated, however, the evidence available to us with respect to general patterns is ambiguous. In our view, in the absence of better information than is now available to the Commission with respect to general patterns, it would be inappropriate to impose the provisions of the *Family Law Act* upon same-sex couples who have neither entered an agreement to this effect nor made a decision to become Registered Domestic Partners. It would be inappropriate to impose substantial economic rights and obligations on a group of citizens without adequate information about their experience and needs. We suggest that consultation with members of the gay and lesbian community is essential before this step is taken. Accordingly, we have concluded that we cannot recommend that same-sex couples who choose not to register should have spousal status ascribed to them by legislation.

The Commission, therefore, recommends that the Legislature should acquire further information concerning attitudes and expectations within the gay and lesbian community before ascribing spousal status under the *Family Law Act* to same-sex couples who have not exercised their right to become Registered Domestic Partners.

NOTE: The Legislative Response to *M. v. H.*

Following the Supreme Court of Canada's decision in *M. v. H.*, the Ontario government introduced Bill 5, *An Act to amend certain statutes because of the Supreme Court of Canada Decision in M. v. H.*, (assented to 25 October 1999, S.O. 1999, c.6) extending to same-sex couples the same legal rights and responsibilities as cohabiting opposite-sex couples in all matters covered by Ontario law. In 2000, the federal government enacted the *Modernization of Benefits and Obligations Act* (*MBOA*) which amended 68 federal statutes in a similar fashion. Neither law changed the definition of "spouse"; in the Ontario legislation same-sex couples (but not opposite-sex unmarried couples) were referred to as "same-sex partners" [in 2005, after the legalization of same-sex marriage, the term "same-sex partner" was removed and replaced with the term "spouse"]; federal legislation uses the term "common law partner" to refer to all unmarried couples, both opposite-sex and same-sex.

In the aftermath of *M. v. H.* virtually all of the provinces passed laws extending to same sex couples the same rights and responsibilities as opposite sex cohabiting couples. In some provinces, like Alberta, the legal recognition was limited. In most other provinces, the legal recognition was more extensive. The continuing story of the legal recognition of same-sex couples will be dealt with further below, in the materials dealing with same-sex marriage.

In the course of these reforms definitions of spouse were often standardized throughout provincial/territorial legislation and remaining instances of differential treatment of married and unmarried couples were removed. The exception was matrimonial property rights. As will be discussed further in Chapter V, Matrimonial Property (Vol. II), only a few provinces and territories have chosen to extend matrimonial property rights to unmarried couples. The issue of the constitutionality of that remaining distinction was presented to the Supreme Court of Canada in 2002 in the *Walsh v. Bona* found below.

It should also be noted that the Alberta legislation responding to *M. v. H.* utilized the concept of "adult interdependent partners" which applies to a wide range of non-marital, interdependent relationships, including non-conjugal relationships. This legislation will be discussed in more detail at the end of the materials on unmarried cohabitation where we explore other models for regulation and recognition of close personal relationships.

Nova Scotia (Attorney General) v. Walsh

[2002] 2 S.C.R. 325, 32 R.F.L. (5th) 81 (sub nom *Walsh v. Bona*)

BASTARACHE J. (McLachlin C.J.C., Iacobucci, Major, Biniie, Arbour and LeBel JJ. concurring):

I. Introduction

[1] This case involves a *Charter* challenge to the Nova Scotia *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 ("*MPA*"), and asks whether its failure to include unmarried cohabiting opposite sex couples from its ambit violates s. 15(1). The challenge revolves around the definition of "spouse" in s. 2(g) of the *MPA*, which is limited to a man and a woman who are married to each other.

[2] The question before this Court, then, is whether the exclusion from the *MPA* of unmarried cohabiting persons of the opposite sex is discriminatory. In my view, it is not. The distinction chosen by the legislature does not affect the dignity of unmarried persons who have formed relationships of some permanence and does not deny them access to a benefit or advantage available to married persons. It is, therefore, not discriminatory within the meaning of s. 15(1).

II. Factual Background

[3] Susan Walsh and Wayne Bona lived together in a cohabiting relationship for a period of 10 years, ending in 1995. Two children were born out of this relationship, in 1988 and 1990 respectively. Walsh and Bona owned a home as joint tenants, in which Bona continued to reside after the separation, assuming the debts and expenses associated with the property. In 1983, Bona received as a gift from his father a cottage property which was sold after separation for $20,000. Approximately $10,000 was used to pay off the respondents' debts. Bona also retained 13 acres of surrounding woodland in his own name, valued at $6,500. The total value of assets retained by Bona at the date of separation including the house, cottage, lot, vehicle, pensions and RRSPs, was $116,000, less "matrimonial" debts of $50,000, for a net value of $66,000.

[4] The respondent Walsh claimed support for herself and the two children. She further sought a declaration that the Nova Scotia *MPA* was unconstitutional in failing to furnish her with the presumption, applicable to married spouses, of an equal division of matrimonial property. [More specifically, Walsh claimed that this failure was discriminatory under s. 15 of the Charter.] Her claim for a declaration was rejected by the chambers judge, whose decision was reversed on appeal.

[Before the Supreme Court of Canada heard the appeal, Nova Scotia enacted legislation responding both to the Court of Appeal decision in *Walsh* and *M. v. H.* The *Law Reform(2000) Act*, S.N.S. 2000, c. 29, [*LRA*] created a scheme allowing unmarried couples, both opposite sex